

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA ANN GRIFFITH
Claimant

VS.

WOLF CREEK NUCLEAR OPER. CORP.
Self-Insured Respondent

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Docket No. **1,012,810**

ORDER

Claimant requested review of the December 14, 2009 Order by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for penalties. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared for the claimant. John D. Jurcyk of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award.

ISSUES

Both parties requested Board review of the ALJ's underlying Award in this claim. After the Board heard oral arguments on the review from the Award, claimant filed a demand for payment before the Board issued its decision. The claimant amended the demand for payment and sought payment of all the compensation the ALJ had awarded. The respondent did not pay and the matter proceeded to a penalty hearing before the ALJ. The ALJ concluded that no compensation was due under K.S.A. 44-512a because K.S.A. 44-551(i)(2)(B) stayed payment of the compensation due and owing at the time of his award pending review by the Board. Consequently, the ALJ denied claimant's application for penalties.

Claimant requests review of whether the ALJ erred in denying civil penalties to claimant due to respondent's failure to pay the demand served upon it following the failure of the Board to issue a ruling within 30 days following oral argument. Claimant argues she is entitled to civil penalties in the maximum amount of \$100 per week for each and every week the award was not timely paid.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award in this claim was dated April 22, 2009. In his award the ALJ found claimant sustained a permanent total disability in the amount of \$125,000 less temporary total disability benefits that had been previously paid. As of the date of the ALJ's Award, all the amounts were due and owing.

Both parties made timely requests for Board review of the ALJ's Award. Oral argument before the Board was held on August 21, 2009.

On September 22, 2009, claimant filed a demand pursuant to K.S.A. 44-551(i)(2)(B) for payment of the ALJ's Award commencing September 21, 2009, in the amount of \$432 per week for temporary total disability compensation. An amended demand for payment was received by respondent on October 6, 2009, requesting payment pursuant to K.S.A. 44-551(i)(2)(B), to wit: "Claimant is entitled to an award of \$125,000, minus amounts previously paid for temporary total disability. As of 4/16/09, all amounts are due and owing."

A penalty hearing was scheduled and held regarding the amended demand for payment. Claimant sought penalties for respondent's failure to pay the entire Award entered by the ALJ.

On October 28, 2009, the Board issued its Order affirming the ALJ's April 22, 2009 Award. The ALJ held the penalty hearing on November 19, 2009.¹ As previously noted, the ALJ denied the request for penalties.

When awards are appealed from the administrative law judge to the Board, the Board has 30 days from the date the parties presented their arguments to the Board to issue its decision. If the Board fails to render a timely decision, the employer must begin paying the weekly disability compensation benefits that the administrative law judge awarded that accrue commencing the 31st day following argument to the Board. But, while the case remains pending before the Board, the employer is not required to pay any of the disability compensation that accrued before that 31st day. Stated another way, any disability compensation that accrued before that 31st day is stayed. K.S.A. 44-551(i) provides in pertinent part as follows:

¹ The claimant made an additional demand upon respondent for payment after the Board issued its Order on review of the underlying Award. However, the only demand addressed at the penalty hearing was the claimant's amended demand served on respondent on October 6, 2009.

(1)(A) . . . The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(2)(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (i)(1), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, **except that no payments shall be made under this provision for any period before the first day after such time period.** Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute. [Emphasis added.]

Because all of the weeks of disability compensation had accrued before the effective dates of the ALJ's Award and the Board's Order, there were no weekly disability compensation benefits due and payable to claimant at the time she made her demand. And because the accrued disability compensation is stayed pending final decision, including appeals to the Court of Appeals, that compensation is not due as required by the penalty statute, K.S.A. 44-512a. Consequently, the Board affirms the ALJ's denial of claimant's request for penalties.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 14, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Brad E. Avery, Administrative Law Judge